



# ICLG

The International Comparative Legal Guide to:

## **Employment & Labour Law 2013**

3rd Edition

A practical cross-border insight into employment and labour law

Published by Global Legal Group, with contributions from:

Abdón Pedrajas & Molero  
Allen & Overy LLP  
Anderson Mōri & Tomotsune  
Barrera, Siqueiros y Torres Landa, S.C.  
Bener Law Office  
Boga & Associates  
Caiado Guerreiro & Associados  
Cárdenas & Cárdenas Abogados  
CSB Advocates  
Debarliev, Dameski & Kelesoska Attorneys at Law  
Eduardo Vásquez Silva & Compañía, Abogados  
El-Borai & Partners  
Dittmar & Indrenius  
Funes de Rioja & Asociados  
Grette  
Hogan Lovells

Homburger  
Ikeyi & Arifayan  
KGDI Law Firm  
Kochhar & Co.  
Koep & Partners  
Latournerie Wolfrom & Associés  
MNKS  
Ogletree Deakins  
Pachiu & Associates  
Papacharalambous & Angelides LLC  
Piper Alderman  
Randl Partners  
Salans LLP  
Shook, Hardy & Bacon L.L.P.  
Stikeman Elliott LLP  
Toffoletto De Luca Tamajo e Soci

# GLG

Global Legal Group

#### Contributing Editors

Elizabeth Slattery & Jo Broadbent, Hogan Lovells

#### Account Managers

Beth Bassett, Brigitte Descacq, Dror Levy, Maria Lopez, Florjan Osmani, Oliver Smith, Rory Smith

#### Sales Support Manager

Toni Wyatt

#### Sub-Editors

Beatriz Arroyo  
Fiona Canning

#### Editor

Suzie Kidd

#### Senior Editor

Penny Smale

#### Group Consulting Editor

Alan Falach

#### Group Publisher

Richard Firth

#### Published by

Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

#### GLG Cover Design

F&F Studio Design

#### GLG Cover Image Source

iStockphoto

#### Printed by

Ashford Colour Press Ltd.  
March 2013

Copyright © 2013  
Global Legal Group Ltd.  
All rights reserved  
No photocopying

ISBN 978-1-908070-53-1

ISSN 2045-9653

#### Strategic Partners



## General Chapters:

1	<b>A Better Place to do Business? Employment Law Reform in the UK</b> - Elizabeth Slattery & Jo Broadbent, Hogan Lovells	1
2	<b>High-Stakes EEOC Class Action Litigation in America</b> - William C. Martucci & Kristen A. Page, Shook, Hardy & Bacon L.L.P.	6
3	<b>Engaging Independent Contractors for Multinational Organisations</b> - Carson Burnham & Bonnie Puckett, Ogletree Deakins	9

## Country Question and Answer Chapters:

4	<b>Albania</b>	Boga & Associates: Renata Leka & Emirjon Marku	16
5	<b>Argentina</b>	Funes de Rioja & Asociados: Ignacio Funes de Rioja	23
6	<b>Australia</b>	Piper Alderman: David Ey & Sharlene Wellard	30
7	<b>Belgium</b>	Allen & Overy LLP: Pieter De Koster & Inge Vanderreken	37
8	<b>Canada</b>	Stikeman Elliott LLP: Patrick L. Benaroché & Hélène Bussières	44
9	<b>Chile</b>	Eduardo Vásquez Silva & Compañía, Abogados: Eduardo Vásquez Silva & Pablo Concha Hermosilla	51
10	<b>China</b>	Salans LLP: Dr. Iris Duchetsmann & Cynthia Zheng	56
11	<b>Colombia</b>	Cárdenas & Cárdenas Abogados: Lorena Arámbula & Juanita Vera	63
12	<b>Cyprus</b>	Papacharalambous & Angelides LLC: Loizos Papacharalambous & Nataly Papandreou	68
13	<b>Czech Republic</b>	Randl Partners: Nataša Randlová & Romana Náhlíková Kaletová	75
14	<b>Egypt</b>	El-Borai & Partners: Dr. Ahmed El Borai & Dr. Ramy El Borai	82
15	<b>Finland</b>	Dittmar & Indrenius: Seppo Havia & Jessica Brander	88
16	<b>France</b>	Latournerie Wolfrom & Associés: Sarah-Jane Mirou	96
17	<b>Germany</b>	Allen & Overy LLP: Dr. Hans-Peter Löw	103
18	<b>Greece</b>	KGDI Law Firm: Effie Mitsopoulou & Ioanna Kyriazi	110
19	<b>India</b>	Kochhar & Co.: Manishi Pathak & Poonam Das	118
20	<b>Italy</b>	Toffoletto De Luca Tamajo e Soci: Franco Toffoletto & Valeria Morosini	125
21	<b>Japan</b>	Anderson Mōri & Tomotsune: Nobuhito Sawasaki & Sayaka Ohashi	132
22	<b>Kosovo</b>	Boga & Associates: Sokol Elmazaj & Besarta Kllokoqi	139
23	<b>Luxembourg</b>	MNKS: Marielle Stevenot & Sabrina Alvaro	145
24	<b>Macedonia</b>	Debarliev, Dameski & Kelesoska Attorneys at Law: Emilija Kelesoska Sholjakovska & Elena Miceva	153
25	<b>Malta</b>	CSB Advocates: Doran Magri Demajo & Ann Bugeja	160
26	<b>Mexico</b>	Barrera, Siqueiros y Torres Landa, S.C.: Hugo Hernández-Ojeda Alvarez & Luis Ricardo Ruiz Gutiérrez	168
27	<b>Namibia</b>	Koep & Partners: Hugo Meyer van den Berg & Stephen Vlieghe	174
28	<b>Nigeria</b>	Ikeyi & Arifayan: Nduka Ikeyi & Sam Orji	181
29	<b>Norway</b>	Grette: Johan Hveding & Jens Kristian Johansen	187
30	<b>Portugal</b>	Caiado Guerreiro & Associados: Ricardo Rodrigues Lopes & David Coimbra de Paula	194
31	<b>Romania</b>	Pachiu & Associates: Mihaela Cracea & Corina Radu	200
32	<b>Spain</b>	Abdón Pedrajas & Molero: Sonia Cortés & Jaime Fernández Rodríguez	208
33	<b>Switzerland</b>	Homburger: Dr. Balz Gross & Dr. Roger Zuber	216
34	<b>Turkey</b>	Bener Law Office: Maria Celebi & Batuhan Sahmay	222
35	<b>United Kingdom</b>	Hogan Lovells: Elizabeth Slattery & Jo Broadbent	228
36	<b>USA</b>	Shook, Hardy & Bacon L.L.P.: William C. Martucci & Carrie A. McAtee	234

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

#### Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

# High-Stakes EEOC Class Action Litigation in America

Shook, Hardy & Bacon L.L.P.

William C. Martucci



Kristen A. Page



## Introduction

The Equal Employment Opportunity Commission (commonly referred to as the EEOC) is the agency charged with enforcing many of our federal laws prohibiting workplace discrimination in the United States. In recent years, the EEOC has pursued with vigour its “systemic initiative” – an agency-wide priority to strengthen its approach to investigating and litigating *systemic* cases. The EEOC has defined systemic cases as “pattern or practice, policy, or class cases where the alleged discrimination has a broad impact on an industry, profession, company or geographic area”. The systemic initiative has been gaining steam and looks set to continue – earlier this year, the EEOC said it anticipates filing at least 20 new systemic lawsuits in 2012 and again in 2013.

This means the EEOC is bringing bigger cases, addressing broader issues, affecting more people, and getting more media attention. The EEOC’s headline-grabbing initiative is raising the stakes for employers and heightening their interest in staying out of the EEOC’s sights – defending systemic cases is costly, time-consuming, and often involves publicity. In this chapter, we will provide an overview of the EEOC, analyse its sweeping systemic initiative and current enforcement trends, and, through that lens, provide employers with compliance strategies to help avoid garnering the attention of the EEOC.

## What is the EEOC?

The EEOC is the agency responsible for administering and enforcing many federal anti-discrimination laws, including: Title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act; the Americans with Disabilities Act; the Pregnancy Discrimination Act; the Equal Pay Act; and the Genetic Information Nondiscrimination Act. These laws prohibit workplace discrimination on the basis of race, colour, religion, sex, national origin, age, disability, and genetic information, as well as retaliation.

The agency is headquartered in Washington, D.C., has 15 enforcement districts, and operates through a network of district, field, area, and local offices. It has authority to investigate administrative charges made against covered employers, issue findings, and pursue litigation if it finds reasonable cause to believe discrimination occurred. In addition to investigating charges brought by individuals, the EEOC may also issue what are called “Commissioner’s Charges” on its own. A Commissioner’s Charge is often more broad than an individual charge, and it may also be used as a basis for a lawsuit filing by the EEOC.

## Overview of the EEOC’s Systemic Initiative

The EEOC’s systemic initiative was born in 2005 with the creation of a special task force convened to examine the EEOC’s existing systemic programme and recommend new strategies. The Task Force concluded that combating systemic discrimination should be a top priority for the EEOC and that the agency is *uniquely able* and *uniquely positioned* to do so.

The Task Force said the EEOC has a “unique ability” to identify systemic cases because it has access to substantial data, including information on employment trends and demographic changes. It found the EEOC to be “uniquely positioned” to litigate them because: (1) it does not have to meet the stringent requirements of Fed. R. Civ. P. 23 to maintain a class suit; (2) it may be able to bring certain systemic cases that the private bar is not likely to handle for financial reasons; and (3) its nationwide presence permits it to act as a “large yet highly specialized law firm with a unique role in civil rights enforcement”.

Against this background, the systemic initiative was adopted in 2006, with some of the Task Force’s most important recommendations put into action:

1. Create incentives to encourage the field to identify, investigate, and litigate systemic cases.
2. Staff systemic cases based on experience and expertise, instead of by originating office.
3. Use routinely-collected data in a more strategic way to better identify systemic discrimination.
4. Broaden the investigation of individual charges and educate investigators on initiating Commissioner’s charges.

Since implementation of the initiative, the EEOC has become increasingly aggressive in its pursuit of systemic cases using a “national law firm model”. At the end of fiscal year 2011, the agency maintained 580 active systemic investigations. In that same time period, 40 per cent of its systemic investigations resulted in “reasonable cause” findings, and about one-third of lawsuits filed were “multiple victim” suits.

## Strategies the EEOC is Using to Pursue High-Profile Systemic Cases

The EEOC is using a variety of strategies to advance its systemic initiative and increase its inventory of systemic investigations and lawsuits. Those strategies include:

- Merging the investigation and litigation phases.
- Transforming a single charge into a systemic action.

- Making nationwide requests for data, including broad e-discovery and HR system data.
- Using subpoenas and subpoena enforcement actions to obtain nationwide information from employers.
- Partnering with other agencies (like the OFCCP and DOL) to share information.

These strategies have been effective for the EEOC in many instances, but employers are more frequently challenging them and have had recent success in pushing back on the agency's expansive, and often secretive, investigative efforts. For example, in *EEOC v. Burlington Northern Santa Fe Railroad Company*, the Tenth Circuit rejected the agency's use of its subpoena power to build a systemic case. No. 11-1121 (10th Cir. Feb. 27, 2012). The court found the subpoena for nationwide employment records was "not relevant" to a case that initially involved just two claims of disability discrimination, both from employees in Colorado.

## The EEOC's Leading Enforcement Areas in 2012

In addition to its strategy of pursuing larger cases, the EEOC has given particular focus to certain enforcement areas in recent years, many of which lend themselves quite easily to the systemic initiative.

*Disability Discrimination and Leave Policies:* The EEOC has given special focus to leave of absence policies, particularly to "no fault" leave policies (where an employee is automatically dismissed after using a certain amount of leave). The EEOC's position is that such policies should be modified to account for reasonable accommodations that may be needed by an employee on leave.

*Hiring Practices:* The EEOC believes it is uniquely positioned to investigate and litigate discriminatory hiring cases on a large-scale basis. It is looking for industries where protected groups may be underrepresented in certain job categories, with reliance on data obtained during investigations, in EEO-1 reports, and in census studies.

*Arrest and Conviction Records:* The EEOC has issued updated guidelines providing that criminal record information obtained during background checks cannot be used to screen out applicants, unless the information is related to the field of work in which the candidate is seeking employment. The EEOC's focus is on whether use of background checks has a disproportionate impact on certain protected groups.

*Pay and Promotions:* Again, the EEOC believes it is in a strong position to pursue disparate impact theories relating to pay and promotions, given its ability to obtain nationwide employee data through use of its subpoena power.

*Gender Discrimination:* The EEOC is giving greater focus to pursuing cases involving discriminatory treatment tied to gender-specific traits like pregnancy and breastfeeding, arguing that such differentiated treatment is gender discrimination.

## Compliance Strategies to Stay Out of the EEOC's Sights

The convergence of the EEOC's systemic initiative and its heightened focus on a limited set of enforcement priorities creates an opportunity for employers to be introspective in a few high-priority areas and assess existing policy and procedure for potential change. Below are compliance strategies for employers to consider in readying themselves for anticipated EEOC activity in the coming years.

### Disability Discrimination and Leave Policies

- Amend leave policies calling for "automatic" dismissal after a certain amount of leave is used.
- Ensure that return to work and dismissal procedures involve an individualised assessment.
- Always engage in a meaningful interactive process and account for the ever-expanding definition of "reasonable accommodation".

### Hiring Practices

- Undergo a privileged self-analysis of decision-making and adverse action at every stage of the hiring process to determine any disparate impact areas to be addressed.
- Evaluate each step in the hiring process to ensure each is needed and consistently applied.
- Ensure job descriptions are current and accurately describe the required qualifications.

### Arrest and Conviction Records

- Exercise caution in using criminal background information – only when necessary based on the job position.
- Ensure that criminal history information used to bar an applicant from employment is strongly related to the job the applicant is seeking.
- Consider a privileged self-audit to determine whether use of criminal history information is having a disparate impact on individuals in protected categories.

### Pay and Promotions

- Conduct a privileged self-audit to identify areas of potential concern or disparate impact and steps that might be taken to address those areas.
- Consider a hybrid approach to pay and promotions that incorporates both uniform and individualised standards.

### Gender Discrimination

- Review policies relating to gender-specific activities like breastfeeding and pregnancy.
- Consider policy updates that ensure fair treatment for gender-specific activities.

## What If the EEOC Focuses a Systemic Investigation on Your Company?

If your company should find itself facing the scrutiny of the EEOC in a systemic investigation, there are a few considerations to bear in mind. First, if you receive a broad request for information, attempt to gain an understanding of the reason for the request and cooperatively narrow it. Second, consider providing information to the EEOC in a phased manner and highlight information that may be important, but not requested. Third, if you receive a subpoena from the EEOC, remember there is a very short five-day response time. Fourth, be alert to preservation obligations and provide early notice of the need to maintain broad categories of information. Fifth, involve experienced legal counsel in responding to charges involving a systemic focus – information and documents provided at the outset will influence the course of the investigation and any litigation that may result.

## Concluding Thoughts

The EEOC's systemic initiative is likely to grow and be with multinational employers for many years to come. While the particular enforcement trends will surely evolve, the EEOC's interest in pursuing large cases is not likely to change, particularly in this time of economic challenge. The EEOC believes it is a wise

use of its limited resources to pursue more systemic cases with a greater likelihood of having a broad, deterrent effect. Employers should remain mindful of the EEOC's intent to grow its systemic docket and be self-analytical in terms of potential areas for improvement that could be viewed through a "systemic" lens.



**William C. Martucci**

Shook, Hardy & Bacon L.L.P.  
1155 F Street, N.W., Suite 200  
Washington, D.C. 20004-1305  
USA

Tel: +1 202 783 8400  
Fax: +1 202 783 4211  
Email: [wmartucci@shb.com](mailto:wmartucci@shb.com)  
URL: [www.shb.com](http://www.shb.com)

Bill serves as the practice group leader of SHB's National Employment Litigation & Policy Practice, representing corporate employers exclusively. Working as part of a trial team, presenting and winning cases on behalf of companies before juries, and advising corporate clients concerning effective business and human resources practices are the primary activities in which Bill engages. He has successfully tried a number of jury cases and resolved a variety of class action cases. His primary practice areas target complex class action (employment discrimination and wage and hour) litigation, EEOC litigation, unfair competition litigation, and ERISA litigation. His jury work has been featured in *The National Law Journal*, while *Human Resource Executive* has recognised Bill as one of America's Most Powerful Employment Lawyers.



**Kristen A. Page**

Shook, Hardy & Bacon L.L.P.  
2555 Grand Boulevard  
Kansas City, Missouri 64108-2613  
USA

Tel: +1 816 474 6550  
Fax: +1 816 421 5547  
Email: [kpage@shb.com](mailto:kpage@shb.com)  
URL: [www.shb.com](http://www.shb.com)

Kristen is a partner in SHB's National Employment Litigation & Policy Practice who focuses exclusively on representing corporate employers on a national scale, both in federal and state courts, with respect to a wide range of employment and business matters. She has extensive experience litigating in the areas of discrimination and harassment, wage and hour, non-competition, and retaliation. She frequently handles litigation in the class and multi-plaintiff context, including litigating complex matters with the Equal Employment Opportunity Commission and addressing the intricacies of international employment jurisdiction and electronic discovery concerns for the global employer. She also assists clients navigate administrative processes and tackle challenging personnel and global employment policy issues.



SHB NATIONAL EMPLOYMENT LITIGATION & POLICY PRACTICE

The SHB National Employment Litigation Practice represents corporate employers in complex class action (employment discrimination and wage & hour) and EEOC litigation. *Chambers USA: America's Leading Lawyers for Business* describes SHB as: "A Powerhouse. Truly one of the best litigation firms in the nation". Innovation and collaboration are SHB hallmarks.

Geneva | Houston | Kansas City | London | Miami | Orange County  
Philadelphia | San Francisco | Tampa | Washington, D.C.

**For more information, contact:**

William C. Martucci  
Partner, Shook, Hardy & Bacon L.L.P.  
1155 F Street, N.W., Suite 200, Washington, D.C. 20004-1305, USA  
Tel: +1 202 783 8400  
Fax: +1 202 783 4211  
Email: [wmartucci@shb.com](mailto:wmartucci@shb.com)  
URL: [www.shb.com](http://www.shb.com)

## Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping
- Telecoms, Media & Internet
- Trade Marks



59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [sales@glgroup.co.uk](mailto:sales@glgroup.co.uk)

[www.iclg.co.uk](http://www.iclg.co.uk)